Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

BOBBY R.; JOYCE R.; and CAIUS R.,

Petitioner,

-versus-

HOUSTON INDEPENDENT SCHOOL DISTRICT

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Fifth Circuit opinion establishing a "harmless error" standard when reviewing acknowledged violations of the Procedural Safeguards section of the IDEA, and the acknowledged failure and/or refusal to implement a disabled student's Individualized Education Plan is inconsistent with this Court's decisions in *Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley*, 458 U.S. 176 (1982), and *Honig v. Doe*, 484 U.S. 305 (1988), and the Individuals With Disabilities Education Act — which provides that eligible disabled children are entitled to a free and appropriate public education that is consistent with the procedural requirements of the IDEA and is reasonably calculated to confer educational benefit.

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The Fifth Circuit opinion is included as (App. A). The district court opinion is included as (App. B). The decision of the administrative due process hearing officer is included as (App. C).

STATEMENT OF JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on January 20, 2000. Jurisdiction in the court of first instance is based upon pursuant to the Individuals with Disabilities in Education Act ("IDEA"), 20 U.S.C. § 1400, *et seq.* and pursuant to 28 U.S.C. § 1331, and pursuant to 28 U.S.C. §1343(a), and pursuant to 28 U.S.C. §1367. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Individuals With Disabilities Education Act, 20 U.S.C. § 1400.

The IDEA provides in pertinent part that the purpose of the Act is:

> ...to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs...

The decision of this Court in *Board of Education of the Hendrick Hudson Central School District, Westchester County*

v. Rowley, 458 U.S. 176 (1982) states in pertinent part the following test to determine if a student has received a Free and Appropriate Public Education:

> "First, has the State complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits?"

STATEMENT OF THE CASE

Caius R. was denied FAPE by the Houston Independent School District from 1994-95 school year through the 1996-97 school year. The District failed to provide him with various components of his education which they had agreed to provide him such as modifications, speech therapy and a specialized reading program for dyslexia. Mr. and Mrs. R. filed a complaint with the State of Texas and requested an administrative special eeducation due process hearing. They requested the hearing officer to consider: (1) whether the school district had provided Caius with a FAPE beginning in January, 1994 through the 1996-1997 school year; (2) whether the goals and objectives of his Individual Education Plan ("IEP") for each school year was appropriate and realistic1; (3) whether instructional modifications stated in the IEP for each year were properly and consistently implemented as required by the IDEA2; (4) whether the school district had agreed to provide him with the specific instructional program of Alphabetic Phonics and failed to do so; (5) whether the school district had provided the speech therapy designated by his IEPs; (6) whether his placement was appropriate, and; (7) whether the district had proper notice of the parents complaints about

programming and placement.

The hearing was held on February 18 & 19, 1997. The hearing officer entered her final decision on April 2, 1997. The decision ordered that the ARD Committee convene within five school days of the date of the decision to confirm the continued use of the Alphabetic Phonics curriculum with the current certified instructor through the end of this academic year; identify an HISD staff member, teacher, and/or administrator to function as an Inclusion Facilitator; designate a parent liaison to assist with programs and placement information for planned entry into middle school; and design and identify compensatory education services to address Caius' needs in reading, language, and speech.

On May 8, 1997, HISD filed an appeal of the Texas Education Agency hearing officer's decision to the United States District Court for the Southern District of Texas, Houston Division. On March 23, 1998, District Court Judge Kenneth M. Hoyt granted Plaintiff's Summary Judgment Motion and entered final judgment, reversing the hearing officer's decision. The Court of Appeals affirmed.

A. The Denial of FAPE by the School District in this Matter

Caius R. has attended school in HISD since kindergarten in the 1990-91 school year. (TEA Record at 903). Caius struggled academically and in late February of 1991 his teacher referred him for special education assessment. The specific area of concern was whether he required speech therapy. The evaluation was delayed until the fall semester of his first grade year 1991-92. The results of the report indicated that Caius did not qualify for services. Caius struggled during his first grade year, and his teacher informed his parents that he needed instruction in phonics.

The principal of the school would not permit the instruction in phonics. His teacher took maternity leave in October of 1991. She returned in the spring and started to tutor Caius in her home on Saturdays. Caius continued to struggle and the principal sent the parents a letter informing them that it was recommended that he repeat the first grade..

Caius' parents had him evaluated at the University of Houston at their expense during the summer of 1992. He was diagnosed with dyslexia and Attention Deficit Disorder. It was recommended that Caius consider private tutoring, special education testing for learning disabilities and speech impairment, medical treatment, dyslexia training, and attend a private school.

Caius was enrolled in the *Busybodies* private school during 1992-93, his second grade year. He remained there until March, 1993, at that time his parents enrolled him at Mitchell Elementary, his home school in HISD. Caius' parents gave the school district a copy of the University of Houston assessment and the District informed them that they could not use the report.

During the summer of 1993 Caius' parents paid for him to receive tutoring services at the Texas Children's Hospital Learning Support Center. There are no grades listed on Caius' permanent record for the second grade.

Caius was referred for special education evaluation again on November 9, 1993, by Ms. Pena his third grade teacher at Mitchell. A CIA was completed on December 9, 1993, and the report indicated that Caius appeared to be eligible for special education services as a learning disabled student. The assessment determined that his academic achievement was not commensurate with his level of intellectual functioning in the area of written language, basic reading skills, oral language, and listening. The report also indicated that Caius suffered from a severe visual perception deficit, including rotations and

reversals of letters and numbers.

On January 18, 1994, Caius was found by the ARD Committee to be eligible for special education services as a student with learning disabilities. He also qualified in the area of speech. IEP's were written for reading, and written and oral language. Caius received resource assistance for ten hours per week in reading and language, and one hour per week in speech. The ARD Committee also determined that Caius required eleven different educational modifications in his IEP.

Caius took the TAAS in the spring of 1994 and the results indicated that he did not meet the minimum expectations in Reading or Math.

Caius never received his speech therapy during the school year of 1994-95, because a speech therapist was not available at Mitchell Elementary. At the end of the year Caius was placed, not promoted to the fourth grade. During the summer of 1994 a family friend, who was a teacher in the Clear Creek ISD, told Caius' parents that Caius was dyslexic.

Caius was not provided with a resource placement at Mitchell until October 1, 1994, because Mitchell Elementary was not aware that Caius was a special education student. In September, 1994, Mr. R. made the resource teacher aware of Caius and the need for Alphabetic Phonics (hereinafter, "AP"), the resource teacher agreed. Mitchell did not have AP so a placement was recommended for Lewis Elementary. One day before the scheduled ARD at Lewis the enrollment was capped at that school. The ARD was then scheduled and held at Mitchell on September 30, 1994. The Committee agreed that Caius required a multisensory program (AP). However, it is unclear what else the committee discussed or reviewed since the only documents completed were the two pages of the minutes and the signature page. As of the date of the ARD Committee meeting, Caius' teachers were not aware that he was disabled or that he had modifications, and speech services had not been

provided. Caius' teachers were given notice of his modifications for the first time on January 13, 1995, more than one year after the ARD which had designated that Caius required them to benefit from his regular education placement. Caius continued to struggle academically and was receiving failing grades in spelling, math and science.

On February 8, 1995 an annual ARD was held and new IEP's were written for Caius. Caius' previous IEPs from the January 18, 1994 ARD had expired as of January 18, 1995. No IEPs were in place for Caius to cover the 21-day time period until February 8, 1995. Caius had not mastered his IEP's from January 18, 1994. The Committee agreed that Caius had not been provided any speech therapy services as of the date of the ARD Committee meeting, because Mitchell did not have a speech therapist. Mr. R. did not agree with the deliberations of the ARD.

On March 3, 1995 Ms. Nancy LaFevers, M.A., CCC, Speech and Language Pathologist evaluated Caius. She identified him as dyslexic and recommended the AP program. On March 7, 1995, an ARD was held and Mr. R. presented a letter containing his complaints about Caius' education. The ARD Committee agreed to provide Caius with multisensory instruction, and recommended that an expert in multisensory instruction be consulted. The committee also agreed that speech Services had not been provided as of the date of the ARD.

On April 3 & 20, 1995, Ms. Jeri Cook, Coordinator of the Multisensory/Inclusion Programs in HISD completed two observations of Caius and wrote reports with recommendations to the ARD Committee. She made several recommendations including taped texts and highlighted texts.

On April 8, 1995, Beatrice Wilkens completed a "Psycho-Educational Evaluation" on Caius. Her report indicated that his full scale IQ was 106, and that he suffered from a visual-motor delay which severely impacts his

from a visual-motor delay which severely impacts his education. She made several recommendations including allowing him to use a computer or word processor. On May 11. 1995, Elaine Peterson completed a CIA. Ms. Peterson did not complete any new testing, instead she accepted and utilized the assessment of Ms. Wilkens. A Multidisciplinary Assessment Team agreed that Caius had severe areas of deficits in reading, math, writing, and spelling.

On May 17, 1995, an ARD Committee meeting was held and new IEPs were written. However, Caius had not mastered his objectives and goals from his previous IEPs of February 8, 1995. The Committee agreed to provide additional modifications to Caius, including taped texts in reading, and highlighted texts in all subjects. The Committee agreed to provide an AP reading program. The Committee also agreed that Caius had not been provided speech therapy and that he was entitled to compensatory education. Mr. R. did not agree that providing speech in the summer makes up for the denial of speech for the previous 18 months.

Caius took the TAAS in the spring of 1995 and the results indicated that he failed to meet the minimum expectations in writing, reading, and math. Caius was placed and not promoted to the fifth grade.

On May 31, 1995 an Adaptive/Assistive Technology Referral Form was completed on Caius, and Laurinda Ogburn conducted a site visit on June 14, 1995. On October 11, 1995 he received additional adaptive equipment to meet his educational needs.

Caius received Extended Year Services ("EYS") during the summer of 1995, the speech instructor indicated that he received 25 hours of speech instruction, though the ARD committee had recognized that he was owed more hours. His EYS reading and math instructor recommended that he receive the AP program.

recommended use of a computer for word processing.

On September 25, 1995, an ARD Committee meeting was held at Cornelius Elementary to discuss placing Caius there so that he could receive AP and a multisensory instruction. After initially indicating that she accept Caius the principal of Cornelius denied the request. A decision was finally made to bring the teacher to Mitchell to instruct Caius in AP until Mr. Miller could obtain training to take over. A new IEP was written for Caius' AP instruction. Mr. R. complained that Caius' modifications had not been provided.

Mr. R. began requesting that the school implement the required modifications and instruction that Caius should have been receiving all along, but was not.

On January 18, 1996, Mr. R. requested that the District show proof that Caius was receiving taped texts in reading and highlighted texts in all subjects. Mr. R. also provided the District with a list of topics he would discuss at the ARD Committee meeting to be held on January 19, 1996, including modifications and assistive technology.

On January 19, 1996 the ARD Committee determined that Caius would be mainstreamed, and that taped texts and highlighted texts had not been provided. New IEP's were written for Caius.

An ARD Committee was held at Codwell to plan for the 1996-97 school year. New IEPs were written for reading and speech. Mr. R. was forced to give up his son's modifications at Codwell because the principal told him that Codwell did not highlight books, they did not tape texts, and they did not "buy" into AP.

At an ARD Committee meeting held on August 26, 1996, the modifications for taped texts and highlighted books were given back to Caius. The principal informed Mr. R. that Codwell did not have an instructor for AP, so Mr. R. was promised that an itinerant teacher would be hired to provide these services. This

Codwell did not have an instructor for AP. so Mr. R. was promised that an itinerant teacher would be hired to provide these services. This teacher did not begin working with Caius until November 1996. Mr. R. had selected Codwell as an alternative placement for Caius because information he had received from Superintendent Rod Paige indicated that Codwell had eleven campus teachers with dyslexia training.

On August 28, 1996 Caius was given a speech reevaluation and he continued to qualify for services. The speech therapist, Mr. Earl Thompson, indicated a moderate to severe level of impairment and that Caius' language skills interfered with academic and emotional functioning.

On September 10, 1996 another Adaptive/Assistive Technology referral was made. The report resulting from the referral was issued on October 11, 1996. On September 30, 1996 Caius' regular classroom teacher resigned from her position.

On October 18, 1996 he received his report card for the first nine-week period. Caius failed Language, Math, Science and Social Studies.

On November 5, 1996 Caius was given a reevaluation by Ms. LaFevers, the results indicated that Caius has not made progress under his IEPs and in many cases he has regressed.

Caius has not been provided with highlighted texts, taped texts, or Adaptive/Assistive.

A due process hearing was held in February, 1997. An ARD was held on February 28, 1997. Their attorney, Mr. Hans Graff, represented HISD at the meeting. Mr. R. protested the presence of Mr. Graff. Mr. R. said it was a violation since he did not have notice and did not bring an attorney to represent Caius. Mr. Graff informed Mr. R. that he was there because he believed that a volunteer advocate for Caius would be attending the ARD. That volunteer advocate was not in attendance.

The competencies listed in the IEP report of February

due process hearing. At that time, Ms. Andress said that Caius mastery level was at 85%.

At the February 28, 1997 ARD, it was discussed that the teacher Caius had in regular education classes was the third permanent substitute that had been in place since the original teacher resigned in September 1997. It was discovered that the new teacher, Ms. Dearborne, was not certified to implement IEPs. Mr. R. requested 54 hours of compensatory reading instruction for the period from August 1996 through November 1996 when Caius was not receiving implementation of his AP Reading IEP. All members were in agreement according to the signature page of the ARD document.

Dr. Addison, principal of Codwell, did not want Caius to return to her campus for any compensatory services in the summer. She told the parent that Caius could go back to the Mitchell campus.

The decision of the hearing officer was entered on April 2, 1997. The hearing officer found for the Petitioner.

A promotion ARD was scheduled for April 14, 1997. Mr. R., notified the school that Caius' attorney, Mr. McCall, would be attending the meeting with him. When the ARD began, Mr. R. was informed that the district was canceling the ARD per a decision made by Mr. Hans Graff, their attorney. Mr. Graff was not in attendance. Mr. R. asked that the Texas Education Agency be called to try an settle the matter that day so plans could be made for the upcoming year and to implement the hearing officer's decision. The school personnel refused. Mr. R. was allowed to make a statement regarding the fact that at the February 28, 1997 ARD, Mr. Graff was in attendance without notice and the ARD proceeded over Mr. R.'s objections. Mr. R. signed in disagreement on the signature page. Mr. R. then returned tapes he had been given earlier in the year that were supposed to be Caius' taped texts, but proved to be the wrong tapes.

the year that were supposed to be Caius' taped texts, but proved to be the wrong tapes.

An ARD was never held to discuss the hearing officer's decision or implement any of her rulings. A promotion ARD for Caius was never held at Codwell to develop new IEPs, schedule modifications, decide placement, or discuss progress. Mr. R. attempted to schedule ARDs, but the district would not comply. He wrote to Dr. Addison on May 20, 1997, but was told Mr. Graff was unavailable. Mr. R. sent alternate dates for June of 1997, but Dr. Addison continued to say Mr. Graff was unavailable.

HISD filed an appeal of the hearing officer's decision in May, 1997. However, the District refused to maintain the last mutually agreed placement and program pending the outcome of the appeal.

Since the district had failed to implement the hearing officer's decisions, and refused to maintain the "stay put" placement and program, Mr. R. was forced to provide Caius with the designated speech services during the summer of 1997, at his own expense. Caius attended the Speech and Language Clinic at the University of Houston's main campus. The facility evaluated Caius in two sessions held on July 1 and 8, 1997. The evaluation revealed that Caius had severe deficits in concepts and directions, word classes, semantic and relationships, formulated sentences, recalling sentences, sentence assembly, and hearing vocabulary. The report revealed that all of Caius' Speech and Language IEPs should maintain an 85-90% mastery level in order to ensure school success. However, Caius was only able to attend four therapy sessions, since each session cost Mr. R. $65.00, for a total cost of $260.00.

Mr. R. also had to provide academic support during the summer due to the district's failure to implement the hearing officer's decision. Mr. R. took Caius to Educere. Educere is a

work with children with learning disabilities. The hourly fee is $50.00. Mr. R. paid Educere $450.00 for part of the sessions Caius had with Mrs. White. When the R.'s could no longer afford to provide these services for Caius, Mrs. White continued to work with Caius on a regular basis without charge. She chose to do this for Caius because of her commitment as a teacher and the involvement she had with the early development of HISD's reading programs. Caius would spend three hours a session at Educere during the summer. Once school resumed in August of 1997, Caius saw Mrs. White for one hour a week. He continues to attend sessions at Educere through the present date of April 14, 1999. Mrs. White has recommended that Caius will need to work with Educere for two more years. Caius had made remarkable progress with Mrs. White.

An ARD was held at Thomas Middle School on August 4 and 13, 1997 for the purpose of promotion and review. Twenty people were in attendance. At the August 4, 1997 meeting, Mr. Graff would not allow any minutes to be taken or any questions to be answered. Mr. Thompson, Caius' school speech therapist, reviewed the previous IEPs for speech. Mr. Thompson informed the committee that Caius was at 70% mastery of the objectives of his previous speech IEP. Though the IEPs called for 90% mastery, Mr. Thompson said there was no need to continue the objectives. Mr. Thompson said that Caius would get the other 20% himself. The new Speech IEPs developed by Mr. Thompson only had 70% mastery criteria, as opposed to previous Speech IEPs developed by past ARD committees and the finding of the University of Houston's Speech and Language report.

When the meeting reconvened on August 13, 1997 a new AP Reading IEP, Speech/Language IEP, and Content Mastery IEP were developed. Jeff Rogers, an attorney representing the district in their Federal appeal of the hearing officer's decision, was present. He sat on top of a desk so he could monitor the

representing the district in their Federal appeal of the hearing officer's decision, was present. He sat on top of a desk so he could monitor the taking of the minutes. He would tell the recorder, Mr. Thompson, what to write into the minutes. He controlled the ARD as Mr. Graff did on August 4, 1997.

Mr. R. did not agree with the IEP program and placement proposed by the school district. He requested that the hearing officer's decision be considered to no avail. Mr. R. requested reimbursement for the services of the University of Houston's Speech/Language clinic, Jean White, and transportation costs. He requested the district place Caius at The Cliffwood School and pay all tuition and transportation costs. Some of the other requests made by Mr. R. were for an inclusion facilitator, liaison person, compensatory education for speech, language and reading, co-teaching classes, continuation of services at the University of Houston's Speech and Language clinic and Educere at school expense, and implementation of modifications from the February 28, 1997 ARD. These requests were written into a disagreement statement by Mr. R. and attached to the ARD document.

HISD is not providing Caius' related support services, such as speech therapy, at The Cliffwood School.

Another ARD was held on August 26, 1997. All previous persons attending the August 13, 1997 meeting were in attendance. An offer was made for the ARD committee to reconsider Mr. R.'s requests so that this matter could be settled. The district refused. The district offered an offer of a compensatory summer reading program to Mr. R. An offer of additional speech time during the school week was made, but Mr. R. did not want Caius to miss any more instruction in his core academic classes. Mr. R. said he would agree to a different placement within HISD. Mr. R. requested a transfer from Thomas Middle School to Johnson Middle School but the committee denied his request. Mr. R. wrote a disagreement

listed: such as, emergency TEA mediation.

Caius continues to make progress with Jean White, his placement at Cliffwood, and with a private speech therapist. Caius' parents have spent $260.00 for speech therapy services from the University of Houston, $450.00 for language/reading instruction with Ms. Jean White at Educere, and $1525.00 in tuition and costs for Caius' education at the Cliffwood School. In addition, Caius' parents have incurred 100 round trip miles to the University of Houston, 960 round trip miles to Educere, and 1188 round trip miles to the Cliffwood School.

At the time of Caius' removal the school district was in non-compliance with the hearing officer's decision, and the district refused to maintain the last mutually agreed upon program and placement.

On August 20, 1997, two days after school started, HISD sent two Harris County Sheriff's deputies and a plain clothes officer to the R.'s home to find out why Caius was absent from school. Mr. R. informed them that Caius was attending private school and the district already had notice of that. Deputy Jon Stevenson believed Mr. R. and said that he could not believe that Thomas Middle School would send the officer's out if the school had notice that Caius was attending school elsewhere.

B. Proceedings Below

The district court erred in granting Plaintiff's Motion for Summary Judgment. The district court was required to reexamine the ALJ's findings prior to adopting them, and if the reexamination revealed material factual disputes, summary judgment was not warranted. *Doe v. Metropolitan Nashville Public Schools*, 27 IDELR 219 (6th Cir. 1998). Although the hearing officer reached his own conclusions, Caius wanted to exercise his right in district court to recontest the facts and to present additional evidence. *See* 20 U.S.C. §1415(e)(2). But

hearing officer reached his own conclusions. Caius wanted to exercise his right in district court to recontest the facts and to present additional evidence. *See* 20 U.S.C. §1415(e)(2). But this process was denied to Caius because granting summary judgment precludes the introduction of new and additional evidence. The district court assumed facts stated in the School District's summary judgment as true, without proof of such facts.

A material fact at issue here is whether HISD violated the provisions of IDEA, 20 U.S.C. §1400 et seq., and its implementing regulations, denying Caius with a free and appropriate public education ("FAPE"). This is a material factual dispute. The first requirement of the provision of a FAPE is that the LEA must comply with all procedures set forth in the Act. Secondly, the educational program including the placement and the IEP must be reasonably calculated to enable the child to receive educational benefits. *Board of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley*, 458 U.S. 176 (1982). HISD failed to comply with the procedures set forth in the IDEA by failing to implement all modifications of Caius' IEP, which, in turn, prevented Caius from progressing.

In this case, the district court should have concluded that factual disputes existed according to the record and should have denied summary judgment against the school district.

The Court of Appeals affirmed. App. A.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THE IDEA AND WITH DECISIONS OF THE SUPREME COURT

The Court of Appeals' holding that under the IDEA public schools are allowed to choose what parts of a student's IEP that it will implement, and it's conclusion that "...to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP cannot be squared with the IDEA or with Supreme Court precedent.

The "primary vehicle" for implementing the congressional goals behind the IDEA is the requirement of an IEP for disabled children. And pursuant to §1414(d)(ii) the IEP includes "a statement of measurable goals, including benchmarks or short term objectives, related to (I) meeting the child's needs that result from the child's disability..." Therefore, each goal and objective, service and modification, is chosen by the IEP committee because each respective item is necessary for the child to benefit from his or her education. And to eliminate any item from a child's IEP is to deny the child the required services that the IEP team of qualified person has reasonably calculated to be necessary for the child.

This Court established this precedent in *Board of Educ. of*

of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176 (1982), and solidified, bolstered, and reaffirmed the importance of procedural compliance with the implementation of the child's IEP in *Honig v. Doe*, 484 U.S. 305 (1988). This Court stated:

> "The IEP must be reviewed and, where necessary, revised at least once a year in order to ensure that local agencies tailor the statutorily required 'free appropriate public education' to each child's unique needs. §1414(a)(5).

Honig at 306. The IDEA and the above cited decisions of this Court establish that every component of the child's IEP is necessary, and if the school removes or fails to provide one or more of the items that school must convene an IEP committee with the parent and establish why it is no longer necessary to provide the service. To fail to do so is not only a substantive violation of the IDEA, but it is also a procedural violation. The Court Appeals in the case at hand ruled on the substantive nature of the violation, but ignored the procedural violations that occurred in this matter.

II.

THE QUESTIONS PRESENTED ARE IMPORTANT

The decision of the Court of Appeals will allow public schools in the Fifth Circuit to pick and choose which items from a child's IEP that they deem "significant". It will allow this type of subjective review to be done without parent input, and in violation of the procedural notice requirements of the IDEA. It will errode the bond of trust that is developed when parent and school work together to develop a plan that includes all of the items that are necessary for the disabled child to learn,

because the Appeals Court decision takes away the assurance that Congress intended the IEP to provide to the parent that their child would receive a free and appropriate public education.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)
HOUSTON INDEPENDENT SCHOOL DISTRICT, Plaintiff-Counter Defendant-Appellee, VERSUS BOBBY R.; JOYCE R.; and CAIUS R., Defendants-Counter Claimants-Appellants.

No. 98-20546

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

January 20, 2000, Decided

COUNSEL:
For HOUSTON INDEPENDENT SCHOOL DISTRICT, Plaintiff - Cross Defendant - Appellee: Jeffrey L Rogers, Marilynne Gorham, FELDMAN & ROGERS, Houston, TX.

For BOBBY R, JOYCE R, CAIUS R, Defendants - Cross Claimants - Appellants: Daniel L McCall, Katy, TX.

JUDGES:
Before HIGGINBOTHAM and SMITH, Circuit Judges, and FALLON, District Judge. *

* District Judge of the Eastern District of Louisiana, sitting by designation.

OPINIONBY:
JERRY E. SMITH

OPINION:

[*343] JERRY E. SMITH, Circuit Judge:

Caius R., a minor child, by and through his parents, Bobby R. and Joyce R., initiated this action against the Houston Independent School District ("HISD") in a claim before a Texas Education Agency ("TEA") hearing officer. The TEA determined that HISD had not provided Caius a "free appropriate public education" as required by the Individuals with Disabilities Education Act, *20 U.S.C. § 1400, et seq.* ("IDEA"), and the officer ordered HISD to make certain changes in Caius's education program. On appeal from the TEA's decision, the district court decided in favor of HISD. Concluding that the district provided a free appropriate public education in compliance with the IDEA, we affirm.

I.

Caius attended school in HISD for approximately seven years before being removed to private school in 1997. Within HISD, he struggled from the [**2] beginning, in large part because of dyslexia. In kindergarten and first grade, he experienced difficulties in phonics. Although in 1992 HISD recommended that he repeat the first grade, preliminary evaluations of his need for special education indicated that he did not qualify for these special services.

During the summer preceding the 1992-93 school year, Caius's parents sought an independent evaluation of his learning abilities. After conducting a battery of tests, a University of Houston researcher found that Caius suffered from dyslexia and attention deficit disorder. Caius then enrolled in a private school for a substantial portion of the 1992-93 year. Although HISD had recommended repeating first grade, Caius was placed in a second grade class.

In March 1993, Caius returned to HISD at Mitchell Elementary and, in the fall of 1993, began third grade there. After experiencing more difficulties, he was [*344] referred

in December 1993 for a special education evaluation, which revealed deficiencies in reading, oral language, and written language skills. Pursuant to the IDEA, the HISD convened an Admission, Review, and Dismissal ("ARD") Committee in January 1994 to determine the appropriate [**3] means of addressing Caius's learning disability. Having found that his was speech handicapped, the ARD Committee drafted an Individual Education Plan ("IEP") that called for ten hours of reading and language resource placement and one hour of speech therapy per week. Caius continued under the January 1994 IEP during the remainder of the 1993-94 school year.

At the beginning of the 1994-95 year, HISD placed Caius in the fourth grade. HISD experienced some difficulties during that year in implementing the speech therapy provision of the IEP, so from January 18, 1995, through May 17, 1995, a speech therapist was not on staff at Mitchell Elementary. To compensate Caius for the lost speech therapy, HISD authorized extended-year services for him. Consequently, during the summer following the 1994-95 school year, Caius received twenty-five hours in compensatory speech therapy.

In the meantime, however, Caius's parents voiced objections regarding the implementation of his IEP. In particular, they complained of HISD's failures to institute IEP modifications such as highlighted texts, modified tests, and taped lectures.

Before the 1995-96 year, HISD and Caius's parents engaged in extensive [**4] discussions regarding the school he would attend. Because it was determined that he learned more readily when information was presented in a multisensory fashion, his parents sought placement at an HISD school that could administer an Alphabetic Phonics ("AP") program. Although an alternative placement could not be established, HISD agreed to provide an itinerant teacher to

instruct Caius at Mitchell Elementary until a permanent teacher skilled in AP could be found.

Caius began the AP program in the fall of 1995. Although his instructors changed, the AP program was provided throughout the 1995-96 school year. Nonetheless, his parents continued to criticize HISD's implementation of several modifications to the IEP.

During the spring and fall of 1996, the ARD Committee convened to develop an IEP for Caius's sixth grade year. Under the IEP, he was placed at Codwell Elementary. The plan included seven modifications to his educational program: modified tests, taped texts, highlighted texts, extended time for assignments, shortened assignments, calculator use, and taped assignments. Furthermore, because no teacher at Codwell was trained in AP techniques, HISD began a search for another [**5] AP instructor for Caius.

Despite its efforts, for two months Caius did not receive AP training. During that time, his parents refused to accept the compensatory AP services offered by HISD. Through their complaints to HISD, they also questioned the amount of progress Caius was making under the IEP and the extent to which his teachers were implementing the modifications to the August 1996 IEP.

In October 1996, Caius's parents sought administrative review of the IEP. Following two days of hearings in February 1997, the TEA hearing officer filed written findings of fact and conclusions of law, deciding that the reading and language goals set forth in Caius's IEP's were "reasonable and calculated to provide . . . an educational benefit." But she also found that HISD had failed to implement, "consistently or appropriately," an AP program, IEP modifications, or speech therapy. The hearing officer thus concluded that HISD's failures in these areas had deprived Caius of a "free appropriate public education" under the IDEA.

[*345] Following entry of the hearing officer's decision, the parties failed to negotiate a new IEP for Caius for the 1997-98 school year. In response, his parents sought private [**6] compensatory services during the summer of 1997, and, before the start of the 1997-98 year, his parents withdrew him from HISD and placed him at a private school at their expense and without HISD's approval.

HISD appealed the TEA hearing officer's decision to the district court, which, on cross motions for summary judgment, held that the TEA had erred in its analysis of whether Caius had indeed received a "free appropriate public education" as required by the IDEA. The court reasoned that he had shown improvement in most areas of study and therefore had received an educational benefit in accordance with the goals of the IDEA. The court then granted HISD's motion for summary judgment and denied Caius's cross motion for summary judgment. The court also dismissed Caius's counterclaim for reimbursement for the costs of the private compensatory services.

II.

Caius challenges the determination that HISD provided him with a "free appropriate public education" in accordance with the IDEA, *20 U.S.C. § 1400, et seq.* Specifically, he points to HISD's failure to provide a speech therapist for a substantial portion of the 1994-95 term, its failure to provide an AP [**7] program for approximately two months during the beginning of the 1996-1997 year, and its general failures consistently to provide highlighted and taped texts in accordance with the IEP.

HISD responds first by acknowledging the failures summarized by Caius and by noting that, as a result, there are no genuine issues of material fact that would preclude summary judgment. HISD disagrees, however, with the legal conclusions to be drawn from those failures. It argues that, rather than holding that *any* failure to implement an element

of an IEP amounts to denial of a free appropriate public education under the IDEA, we should look to the overall educational benefit received by the child and to whether the IEP was substantially or materially implemented.

A.

The IDEA is designed to encourage state and local education agencies to extend services to children that are deemed learning disabled. Under the statute, to receive federal funding, a state must establish special education and related services that "are provided in conformity with the *individualized education program* required under section 1414(a)(5) of this title." *20 U.S.C. § 1401*(17)(D) (emphasis added). **[**8]** The term "individualized education program" is defined as

a written statement for each child with a disability developed in any meeting by a representative of the local educational agency . . . which statement shall include--

(A) a statement of the present levels of educational performance of such child,

(B) a statement of annual goals, including short-term instructional objectives,

(C) a statement of the specific educational services to be provided to such child, and the extent to which such child will be able to participate in regular educational programs, . . .

(E) the projected date for initiation and anticipated duration of such services, and

(F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives are being achieved.

20 U.S.C. § 1401(20).

The crafting of an IEP is subject to extensive procedural and substantive requirements. For instance, the IDEA provides **[*346]** procedural safeguards that allow the parents an opportunity to challenge the establishment or implementation of the IEP in an "impartial due process hearing which **[**9]** shall be conducted by the State educational agency . . . as determined by State law." *20 U.S.C. § 1415*(b)(2). In Texas, the hearing is conducted before the TEA.

The IDEA also provides for civil actions and jurisdiction in federal district court "without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate." *20 U.S.C. § 1415*(e)(2). As additional protection for the parents and the disabled child, "during the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child." *20 U.S.C. § 1415*(e)(3)(A).

The Department of Education has interpreted the IDEA to require each public agency to "(1) Provide special education and related services to a child with a disability in accordance **[**10]** with the child's IEP; and (2) Make a *good faith effort* to assist the child to achieve the goals and objectives or benchmarks listed in the IEP." 34 C.F.R. § 300.350(a) (emphasis added). That interpretation provides, however, that

the IDEA "does not require any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and benchmarks or objectives." *Id.* § 300.350(b).

B.

The "free appropriate public education" requirement of the IDEA requires tailoring to the unique needs of the handicapped child by means of an IEP. *See Board of Educ. v. Rowley, 458 U.S. 176, 181, 73 L. Ed. 2d 690, 102 S. Ct. 3034 (1992).* "Noticeably absent from the language of the statute is any substantive standard prescribing the level of education to be accorded handicapped children." *Id. at 189.* After a lengthy analysis of the statute, its purposes, and of the legislative intent with respect to the provision of educational services to disabled children, the *Rowley* Court held that an "'appropriate education' is provided when personalized educational services are provided." *Id. at 197.* **[**11]**

Accordingly, the IDEA "generates no additional requirement that the services so provided be sufficient to maximize each child's potential." *Id. at 198.* This, the Court opined, would be "further than Congress intended to go." *Id. at 199.* Instead, the IDEA is aimed at providing disabled children "access" to a public education, though that access must still "be sufficient to confer *some* educational benefit upon the handicapped child." *Id. at 200* (emphasis added). In the end, then, "the 'basic floor of opportunity' provided by the Act consists of access to specialized instruction and related services which are individually designed to provide educational benefit to the handicapped child." *Id. at 201.*

Next, the Court noted that while the determination whether children are receiving sufficient educational benefits to satisfy the requirements of the IDEA "presents a more difficult problem," a court's inquiry in suits brought under § 1415(e)(2) (as here) should be analyzed under a two-pronged framework. "First, has the State complied with procedures set

forth in the Act? And second, is the [IEP] developed through **[**12]** the Act's procedures *reasonably calculated to enable the child to receive educational benefits*?" *Id. at 206-07* (emphasis added). The Court noted that under the second prong, "the **[*347]** achievement of passing marks and advancement from grade to grade will be one important factor in determining educational benefit." *Id. at 207 n.28.*

Caius does not challenge the IEP or any other HISD actions on the basis of the first prong of the *Rowley* inquiry--that is, he does not assert that HISD did not comply with the lengthy procedures prescribed by the IDEA. And it is doubtful that such a challenge would have any merit. n1 Therefore, the issue is whether the IEP was "reasonably calculated to enable [Caius] to receive an educational benefit."

III.

In *Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 247-48 (5th Cir. 1997),* we summarized the standard under *Rowley*. An IEP need

not be the best possible one, nor one that will maximize the child's educational potential; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit him "to benefit" from the instruction. In other words, the IDEA guarantees only a "basic floor of opportunity" for every disabled child, consisting of "specialized instruction and related services which are individually designed to provide educational benefit." Nevertheless, the educational benefit to which the Act refers and to which an IEP must be geared cannot be a mere modicum or de minimis; rather, an IEP must be "likely to produce progress, not regression or trivial educational advancement." In short, the educational benefit that an IEP is designed to achieve must be "meaningful."

(Internal citations omitted.)

When a district court reviews a state hearing officer's decision in an impartial due process hearing under the IDEA, it must receive the record of the administrative **[**14]** proceedings and is then required to take additional evidence at the request of any party. *20 U.S.C. § 1415*(e)(2). It must accord "due weight" to the hearing officer's findings, *see Rowley, 458 U.S. at 206,* but must ultimately reach an independent decision based on a preponderance of the evidence." *Cypress-Fairbanks, 118 F.3d at 252.* Thus, the district court's review is "virtually de novo." *Id.*

Our review of the district court is a mixed question of fact and law that is reviewed *de novo*, but the underlying fact-findings, "such as findings that a disabled student obtained educational benefits under an IEP, are reviewed for clear error." *Id.* A party attacking the appropriateness of an IEP established by a local educational agency bears the burden of showing why the IEP and resulting placements were inappropriate under the IDEA. *Id.*

A.

In *Cypress-Fairbanks*, we set forth four factors that serve as an indication of whether an IEP is reasonably calculated to provide a meaningful educational benefit under the IDEA. These factors are whether

(1) the program is individualized on the basis of the student's **[**15]** assessment and performance;

(2) the program is administered in the least restrictive environment;

[*348] (3) the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and

(4) positive academic and non-academic benefits are demonstrated.

118 F.3d at 253.

Correctly, HISD argues in its brief, and the district court noted, that only the last two of these factors are seriously in question. First, Caius does not argue that the IEP was not individualized in accordance with the first factor; indeed, such an argument would seem unavailing where the TEA hearing officer had already concluded that the IEP was "reasonably calculated to provide Caius with a meaningful educational benefit." Second, the "least-restrictive-environment" factor should be viewed in light of the IDEA's "preference for 'mainstreaming' handicapped children--educating them with nonhandicapped children." *Rowley, 458 U.S. at 181 n.4.* Because Caius was "mainstreamed" and does not now challenge the IEP on the ground that it was not implemented in the least restrictive means, this second factor is likewise not at issue.

The third and fourth factors, **[**16]** however, call for a more thorough analysis. The requirement that the educational services be provided in a "coordinated and collaborative manner by the key stakeholders" presents a more difficult issue. On the one hand, the district court concluded that HISD met this requirement because "HISD provided the modifications and services outlined in Caius' IEP, allowed Caius' parents to air grievances, and regularly conducted ARD Committee meetings to evaluate Caius' progress under the IEP." While the court opined that the "most significant failing" in this area involved the fact that for substantial portions of the 1994-95 academic year a speech therapist was not available at Mitchell Elementary, the court nonetheless felt that the compensatory services offered the following summer were sufficient to remedy any shortcoming. And with respect to HISD's inability to provide an AP program for two months during the beginning of the 1996-97 year, HISD

argues that the school offered compensatory AP services (which Caius's parents refused) until the school could hire an AP teacher. The court agreed with HISD with respect to the AP services, though it did not carefully analyze the issue.

On the **[**17]** other hand, the hearing officer concluded that HISD had failed on both accounts. That is, she concluded that the compensatory speech therapy services provided by HISD did not cure its earlier failure to implement that portion of the IEP and that the HISD had agreed to provide AP services and had failed to do so in a consistent and proper manner. These conclusions would support Caius's argument that HISD failed to provide the services in a "coordinated" manner, as would his assertion that HISD did not provide highlighted or taped texts in a consistent manner.

The district court's primary reason for overturning the hearing officer's conclusions seems to be its belief that local school agencies should retain some flexibility in scheduling services and, when necessary, providing compensatory services. The court pointed to a Department of Education interpretive response in noting that, "as long as there is no change in the overall amount, some adjustments in scheduling [IEP] services should be possible (based on the professional judgment of the service provider) without holding another IEP meeting." 34 C.F.R. part 300, app. C, question 51 (1997). Accordingly, the court disagreed with **[**18]** the TEA hearing officer and concluded that the compensatory speech therapy services were sufficient.

This conclusion is correct, particularly in light of the Department of Education's interpretive response. Moreover, with respect to the speech therapy and AP services, the district court invited us to consider *Gillette v. Fairland Bd. of Educ., 725 F. Supp. 343 (S.D. Ohio 1989), rev'd on other grounds, 932 F.2d 551 (6th Cir. 1991),* in **[*349]** which the court held that a local education agency's failure to provide all the services and modifications outlined in an IEP does not

constitute a *per se* violation of the IDEA. In *Gillette*, the court found that the local agency had provided a free appropriate education when "*significant provisions* of the IEP were followed," even though the petitioner had clearly demonstrated that portions of the IEP were not implemented at all. *See id. at 347-48* (emphasis added). The same can be said here--i.e., the significant provisions of Caius's IEP were followed, and, as a result, he received an educational benefit. n2

The approach taken in *Gillette* seems reasonable, particularly in light of *Rowley*'s flexible approach. Therefore, we conclude that to prevail on a claim under the IDEA, a party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of that IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing IEP's, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit.

The fourth and final factor under *Cypress-Fairbanks* is whether there have been demonstrable academic and non-academic benefits from the IEP. The district court framed the issue under this inquiry as what should be the appropriate manner for measuring academic advancement under the IDEA. Caius claimed that a child's percentile scores were the best measure of academic performance, while HISD argued that passing marks and advancement from grade to grade were sufficient indicia to satisfy the IDEA. And on this dispute the district **[**20]** court is correct that a disabled child's development should be measured not by his relation to the rest of the class, but rather with respect to the individual student, as declining percentile scores do not necessarily represent a lack of educational benefit, but only a child's inability to maintain the same level of academic progress

achieved by his non-disabled peers. As with the argument in *Rowley* that an IEP must maximize a child's potential, the argument that Caius should not experience declining percentile scores may be an unrealistic goal, and it is a goal not mandated by the IDEA.

Instead, the district court was correct to focus on the fact that Caius's test scores and grade levels in math, written language, passage comprehension, calculation, applied problems, dictation, writing, word identification, broad reading, basis reading cluster and proofing improved during his years in HISD. n3 These improvements **[*350]** are not trivial, and we cannot say that the district court committed "clear error" in its factual determination that Caius received an educational benefit from his IEP. *See Cypress-Fairbanks, 118 F.3d at 252.*

The affidavits submitted by Caius do not change our conclusion. First, Nancy LaFevers, a licensed language pathologist who examined Caius on two occasions, opined that his progress was slower than what she would have expected under "appropriately implemented [AP] training" and that his progress in word attack skills was *de minimis*. Even accepting that characterization of his improvement in word attack, it is not necessary for Caius to improve in *every* area to obtain an educational benefit from his IEP.

Second, Caius submitted an affidavit from Donna Weinberg, the owner and director of the privately-run Cliffwood School where he began attending in 1997. She noted only that Caius has progressed "nicely" since his arrival at Cliffwood School and that he was adjusting to another way of approaching his studies. These statements say nothing about his development or lack thereof, during his years in HISD, and, as a result, they do nothing to establish that he did not receive an educational benefit from the IEP.

Finally, Caius offered the affidavit of Jean White, the owner and operator of Educere, where Caius received private tutoring from White in 1997. Again, like Weinberg's [**22] statements, White's affidavit does not establish that Caius received no educational benefit from HISD. Instead, her affidavit would, at best, support an argument that the IEP developed for Caius did not maximize his educational potential. But as *Rowley* held, the IDEA does not require maximization of a disabled student's educational potential.

There is no genuine issue of material fact about whether Caius received an educational benefit from the IEP, as demonstrated by the objective evidence of increased scores and grade levels. And because there were no material issues of fact presented under the other three *Cypress-Fairbanks* criteria, the district court was correct in finding that Caius received a free appropriate public education in accordance with the IDEA.

B.

Likewise, the court was correct to reject Caius's claims for reimbursement. Although *20 U.S.C. § 1415*(e)(3)(A) provides that "during the pendency of any proceedings conducted pursuant to this section, . . . the child shall remain in the then current educational placement of such child," "parents who unilaterally change their child's placement during the pendency of review proceedings, without [**23] the consent of state or local school officials, do so at their own financial risk. If the courts ultimately determine that the IEP proposed by the school officials was appropriate, the parents would be barred from obtaining reimbursement for any interim period in which their child's placement violated § 1415(e)(3)." *School Committee v. Department of Educ., 471 U.S. 359, 373-74, 85 L. Ed. 2d 385, 105 S. Ct. 1996 (1985).* Because HISD did not consent to Caius's transfer to private school, the district court's dismissal was appropriate.

IV.

In sum, we find that the IEP was reasonably calculated to provide Caius a meaningful educational benefit, in accordance with the IDEA. Moreover, he received that benefit, as demonstrated by his increased test scores in a variety of areas. There is also no evidence that HISD consented to his transfer to private school during the pendency of this appeal. Therefore, the district court was correct in reversing the decision of the hearing officer, in holding that Caius was not denied a **[*351]** "free appropriate public education," and in denying Caius's claims for reimbursement.

AFFIRMED.

----------Footnotes----------

n1 *See Decision of the Hearing Officer*,Docket No. 089-SE-1096, noting:

In this case, issues related to any procedural complaints were withdrawn prior to the beginning of the hearing. Indeed, the evidence showed that Caius' parents were active participants in each and every ARD meeting and that their recommendations and requests in both programming and placement decisions were often accepted by the ARD Committee. The IEP's at issue were the result of collaborative efforts between parents and school, and I find, therefore, that the district did comply with the procedural requirements of the IDEA.

n2 While consideration of any educational benefit received might arguably seem to conflate the third and fourth prongs of the *Cypress-Fairbanks* inquiry, determination of what are "significant" provisions of an IEP cannot be made from an exclusively *ex ante* perspective. Thus, one factor to consider under an *ex post* analysis would be whether the IEP

services that were provided actually conferred an educational benefit.

- \n3 HISD employed the widely utilized and accepted Woodcock Johnson intelligence and achievement test to indicate Caius's academic progress. Caius's test scores showed the following changes from 1993 to 1995: (1) Math scores improved from the 1.7 grade level to 3.1; (2) written language improved from the 1.5 grade level to 1.9; (3) passage comprehension went from 1.7 to 2.2; (4) calculation rose from 1.4 to 3.3; (5) applied problems improved from 2.0 to 3.0; (6) dictation went from 1.6 to 1.8; (7) writing improved from 1.4 to 2.6; (8) word identification, basic reading skills, and letter identification rose from 1.8 to 2.1; and (9) word attack rose from the level of a seven-month kindergarten student to grade level 1.8.

From 1995 to 1996, Caius showed the following improvements: (1) Broad reading increased from 2.1 to 3.3; (2) word identification from 2.1 to 2.8; (3) passage comprehension from 2.2 to 3.9; (4) math from 3.1 to 4.4; (5) calculation from 3.3 to 5.0; (6) applied problems from 3.0 to 3.6; (7) written language from 1.9 to 2.9; (8) dictation from 1.8 to 2.8; (9) writing samples from 2.6 to 3.3; (10) basic reading cluster from 2.1 to 2.8; and (11) proofing from 2.3 to 2.6. Only word attack remained the same, at the 1.8 grade level.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION
HOUSTON INDEPENDENT SCHOOL DISTRICT, Plaintiff, VERSUS BOBBY R.; JOYCE R.; and CAIUS R., Defendants.

3/24/98

MEMORANDUM OPINION -

L INTRODUCTION

Pursuant to the Individuals with Disabilities Education Act. 20 U.S.C. § 1415(e)(2) ("HISD"). the plaintiff Houston Independent School District "(HISD"), instituted the present action as an appeal from the decision of a Texas Education hearing officer. HISD and the defendant, Caius R. by and through his next friends Mr. and Mrs. Bobby R., have tiled cross motions for summary judgment in this matter. The defendant has also moved to amend his answer in order to assert a counterclaim for reimbursement of the private educational expenses incurred during the pendency of this appeal. Having reviewed the motions, the responses, the record, and the applicable law, this Court is of the opinion that HISD's motion for summary judgment should he granted.

II. PROCEDURAL AND FACTUAL HISTORY

Caius R. has attended school in HISD for the greater part of the past seven years. From the beginning, Caius has struggled to succeed in an academic environment. During kindergarten and continuing through first grade, Caius experienced

difficulties in phonics. However, preliminary evaluations of his need for special education indicated that Caius did not qualify for services. In 1992, HISD recommended that Caius repeat the first grade.

During the summer preceding the 1992-93 school year, Caius' parents sought an independent evaluation of Caius' learning abilities. After conducting a battery of tests, a researcher at the University of Houston found that Caius suffered from dyslexia and Attention Deficit Disorder. Caius enrolled at a private school for a substantial portion of the 1992-93 school year. Although HISD had recommended repeating first grade, Caius was placed in a second grade class. In March 1993, Caius returned to HISD at Mitchell Elementary. Because Caius changed schools during the year, his HISD permanent record does not reflect grade activity for the second grade.

In the fall of 1993, Caius began third grade at Mitchell Elementary. After experiencing more difficulties, Caius was referred for a special education evaluation on December 9, 1993. The evaluation revealed deficiencies in Caius academic achievement in reading, oral language, and written language skills. Pursuant to the IDEA, an Admission, Review, and Dismissal ("ARD") Committee convened on January 18, 1994 to determine the appropriate means of addressing Caius' learning disability. Having found that Caius *was* speech handicapped, the ARD Committee drafted an Individual Education Plan ("IEP") for *Caius.* The IEP called for ten hours of reading and language resource placement and one hour of speech therapy per week. Caius continued under the January 1994 IEP during the remainder of the 1993-94 school year. HISD placed Caius in the fourth grade for the following year.

At some point during the 1994-95 school year, HISD experienced difficulties implementing thc speech therapy provisions of Caius' IEP. Fur part of Caius' fourth grade year, a speech therapist was nut on staff at Mitchell Elementary. In order to compensate Caius for the lost speech therapy, HISD authorized extended year services for Caius.t During the remainder of 1994-95, Caius' parents voiced objections regarding the implementation of Caius' lEP. In particular, Caius' purents consistently complained of HISD's failures to institute IEP modifications such as: highlighted texts, modified tests, and taped lectures.

Prior to the *1995-96* school year, HLSD and Caius[fn1] parents engaged in extensive discussions regarding the school Caius would attend for the year. Because Caius leurned more readily when information was presented in a multisensory fashion, Caius' parents sought placement at a school within HISD that could administer an Alphabetic Phonics program. Although an alternative placement could not be established, 1USD agreed to provide an itinerate teacher to instruct Caius at Mitchell Elementary until a permanent teacher could he found. Following these discussions, Caius began the Alphabetic Phonics program in the tall of 1995. Although his instructors changed, the Alphabetic Phonics pmgmm was provided throughout the 199 5-96 school year. However, Caius parents continued io criticize HISD's implementation of several IEP modification

During the spring and fall of 1996, the ARD Committee convened to develop an IEP for Caius' sixth wade year. Under the 1EP, Caius was placed at Codwell Elementary. The plan included seven modifications to Caius educational program, modified tests, taped texts, highlighted texts, extended time for assignments, shortened assignments,

calculator usc, and taped assignments. Furthermore, because no teacher was trained in the technique at Codwell, HISD began a search for an Alphabetic Phonics instructor for Caius. For two months at Codwell, Calus did not receive Alphabetic Phonics training. Caius' parents refused to accept the compensatory Alphabetic Phonics services offered by T-HSD. During the fall, Caius' parenis also questioned the amount of progress Caius was making under the IEP and the extent Caius' teachers were implementing the modifications in the August 1996 IEP

In October 1996, Caius' parents sought administrative review of HISD's IEP for Caius. Following two days of hearings in February 1997, the hearing ooficer filed written findings of fact and ocnclusions of law. The hearing officer held that the reading and language goals set forth in Caius' IEP's were "reasonable and calculated to provide... and educational benefit." The hearing officer also found that HISD had failed to implement, "consistently or approriately," an Alphabetic phonics prgram, IEP modifications, or speech therapy. the hearing office concluded that HISD's failure in these areas had deprived Caius of a free appropriate public education under th IDEA.

Follwowing entry of the hearing officer's decision on April 2, 1997, the parties failed to negoitate a new IEP for Caius for the 1997-1998 school yewar. During the pendency of the appeal, HISD also refused to provide compensatory services in reading, language, and speech as required by the hearing officer's decision. In response, Caius' parents sought private compensatory services for Caius during the summer of 1997. Moeover, when the parties could not agree to an IEP for the 1998-98 school year, Caius was withdrawn from HISD and placed in a private facility at the direction, and expesnse of his parents.

III. Dispute

HISD challenges the hearing oficer's determination that Caius' IEP failed to satisfy the substnative requirements of the IDEA. In particular, HISD notes that Caius progressed from grade to grade and that his grade equivalent scores on standardized tests continued to improvc. Furthermore, HISD argues that all the services specified in Cams' IEP's were provided -- either during the school year or through extended year services. The defendant cites Caius' declining percentile scores and the inconsistent implcmcntation of Caius' TEP as evidence that HISD has failed to provide a free appropriate public education for Caius.

IV. ANALYSIS AND DISCUSSION

A. Standard for Summary Judgment

Summary judgment is proper "if the pleadings, depositions, answers tn interrogatories, and admissions on filc, together with the affidavits, if ally, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ, P. *56(c).* When reviewing the record upon which the moving party's motion for summary judgment is based, the Court must draw all inferences in favor of the non-moving party. *Matsushita Elcc. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1 986 (citing *United States v. Diebola7, Inc.*, 369 U.S. 654 (1962)). The moving party bears the initial burden of "informing the [Court] of the basis for its motion," and identifying those portions of the record "which it believes demonstrate the absence of a genuine issue

of material fact." *Celotex Corp. v. Catrctt,* 477 U.S. 317, 323 (1986).

Once the moving party meets its hurdcn, the nonnioving party must "go beyond the picadings" and designate "specific facts" in the record "showing that there is a

genuine issue *for* trial." *Id.* at 324 An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc., 477* U.S. 242, 247-49 (1986). A failure on the part of the nonmoving party to offer proof concerning an essential clement of its case necessarily renders all other facts immaterial and mandates a finding that no genuine issue of fact exists. *Saunders v. Michelin Tire* Corp., 942 F.2d 299, 301 (5th Cir. 1991).

The primary inquiry here is whcthcr thc material facts present a sufficient disagreement as to require a trial, or whether the facts are sufficiently one-sided that one party should prevail, as a matter of law. *Ander.son, 477* U.S. at 247.. The substantive law of the case identifies which facts are material. *Id.* at 248. Only disputed facts potentially affecting the outcome of the suit under the substantive law of the case preclude the entry of summary j udg*ncnt. *id.*

B. 77w *IDEA*

1. Substantive and Procedural Compliance

The IDEA is a federal statute designed to encourage state and local education agencies to extend services to children that are deemed learning disabled. 1

Under the act, an educational agency must provide a free appropriate public education for all handicapped children as a condition 1.0 the receipt of federal funds. 20 U.S.C. § 1412(1). Furthermore, the act provides for the drafting and implementation of IEP' designed to address the unique educational needs of each disabled student. 20 U.S.C. § 1401(20) The crafling of an IEP is subject to extensive procedural and substantive requirements.[fn2]

The Supreme Court set forth the standard for measuring IDEA compliance in *Board of Education v. Rowley. 458* U.S. 176 (1982). Citing the language and legislative histnry of the IDEA the Court held that an agency supplies a free appropriate public education when disabled children are given *ccaccess* to *specialized instruction* and *related services* which arc *individualLy designed to provide an educational benefit." Id.* at 201 (emphasis added). Although thc hcncfit conferred need not maximize each disabled child's potential, the agency must draft an IEP to provide a meaningful, non-trivial educational benefit based on a child's spccific needs. *Cypress-Fairbanks .Thdrp. Sch. DLct. v. Michael F.,* 118 F.3d *245,* 247-48 (5th Cir. 1997). Thus, the IDEA mandates that educational agencies provide a "basic floor of opportunity" for learning disabled children -- not the best possible education. *Rowley* 458 u.s. at 201; *cypress-Fairbanks,* 11 F.3d at 247-48.

An IEP "sets forth in writing a commitment of resources necessary to enable a child with a disability to receive needed special education and related services." 34 C.F.R. part 300, app. C (1997) (defining purposes of an IEP). Although an JEP generally must he implemented ac soon as the. plan is finalized, some delays, such as an intervening summer vacation or finalization of transportation arrangements, arc permissible. 34 C.F.R. 300.342 (1997); 34

C.F.R. part 300, app.. *C,* question 4 (1997). Even when delays arc not undue, a local cducational agency must still provide all the services listed in an IEP. 34 C.F.R. § 300.346 (1997); 34 C.F.R. part 300, app. *C,* question *45* (1997).

The long-term and short-term objectives and educational services contained in an IEP are not intended to operate as a detailed instructional plan. Instead, the IEP should outline the general direction of a child's education. Under this approach, educators in the classroom are afforded flexibility in determining specific, day-to-day instructional approaches so long as the methods are designed to allow the student to meet an IEP's ultimate goals and objectives. 34 C.F.R. § 300.346 (1997); 34 C.F.R. part 300, app. C, question 41 (1997).[fn4]

2. Scope of Review

The scope of the district court's review ofabearmg officer's decision is "virtually de novo." *Cypress-Fairbanks,* 118 F.3d at 252, *Teague Indep. Sch. Dist. v. Todd L.,* 999 F.2d 127, 131(5th Cir. 1993). lJnder the IDEA, a district court must receive the record of the administrative hearing and any additional evidence offered by either party. 20 U.S.C. § 1415(e)(2). Having received such evidence, the district Court must then reach an independent decision based on a preponderance of the evidence. *Id.; Teague,* 999 F.2d at 131. Even though the administrator's decision is not afforded substantial deference, a court must give the rulings "due weight." *Cypress-Fairbanks,* 1113 F3d at 252. However, the reviewing court must be careful not to impose its own "view of preferable educational methods upon the States." *Rowley,* 458 U.S. at 207. Thus, "once the requirements of the [IDEA] have been met, questions of methodology are for resolution by the States." *Id.* at 208.

A reviewing court follows a two pronged inquiry when examining the adeqmcy nf an IF.P. First, the court must determine if the education agency complied with the procedural requirements of the IDEA.5 *Cypress-Fairbanks,* 118 F.3d at 248. Second, the court must decide if the TEP was designed to provide an educational benefit to the disabled child. *Id.* If the IEP fails to meet either standard, a parent may be entitled to reimbursement for educational expenditures incurred in the course of appropriate private school placement. *Id.* (citine *School Comm. v. Department of Educ.,* 471 U.S. 359,369 (1985)).

Given the hearing officer's decision in this matter, this Court must address a relatively novel issue in the IDEA context. The officer determined that Caius' IEP. as drafted, was "reasonably calculated to provide.. . a meaningful educational benefit" and that the defendant had failed to prove otherwise. However, because THSD implemented Caius' IEP inconsistently, the hearing officer found that Caius had not actually received an educational benefit under the plan. In particular, the hearing officer focused on 1flSD' s failure to provide speech therapy, inability to execute IEP modifications, and inappropriate implementation of the Alphabetic Phonics program. flased on these findings, the hearing officer required the appointment of an "Inclusion Facilitator" to increase coordination of Caius' IEP, thc designation of a liaison between the school district and Caius' parents, and the identification of appropriate compensatory services to address Caius' deficiencies in reading, language, and speech.

C. Caius' *Educational Benefit under the HISD JEP*

A local education agency, such as HISD, cannot shirk its rcsponsibility under the L DEA Communication between parents, educators, and staff is crucial to the successful development and implementation of an LEP. *Oberti v. Board of Educ., 789* F. Supp. 1322, 1328-29 (D.NJ. [992), *affd,* 995 F.2d 1204 (3d Cir. *1993).* Furthermore, a school district must supplement its personnel with "varying degrees of support and training" in order to accommodate the unique needs of a disabled child. *Id.* at] 32g. Once a commitment of servicc5 is established in an TUP, those services must be provided Lu the student. 34 C.F.R. par 300, app. C, question 45 (1997). A local education agency may not withdraw services merely because a student has progressed sufficiently under an IEP such that his goals and objectives have been achieved. Thus, a student's early mastery of an IEP' s goals and objectives are not a basis for refusing to provide the services outlined within the plan.

On the other hand, an TEP is not a guarantor of educational success. Even if an educational agency provides a)] the services listed in an IEP, a student with a learning disability may fail to achieve a plan's objectives. When a lack of progress occurs, a school district will not be held liable for the unfortunate results. *See McDowell* v. *Fort Bond Indep. Sch. Dist.,* 737 F. Supp. 386, 389-90 (S.D. Tex. 1990) (holding school district not necessarily liable for student's failure to progress).

An IEP must be *developed* in a manner that is *reasonahly calculated* provide an educational benefit. *Rowley. 458* U.S. at 206-07. Although progression from grade to grade and the achievement of passing marks is evidence that a plan has provided an educational benefit,6 oilier factors must be cousidered when judging if an IEP was appropriate under the IDEA. 1n *Cypress-Fairbanks.* the Fifth

Circuit noted with approval [lie district court'$ examination of the following objective criteria for measuring thc adequacy of an

> (1) the pro am is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3 the services are provided in a coordinated and collaborative manner by the key "stakeholders"; and@ positive academic and non-academic benefits are demonstrated.

1 18 F.3d at 253-54 Because an IEP does not ensure educational progress, academic advancement, while an important factor, cannot be considered the dispositive factor in determining whether an IEP was reasonably calculated to provide a meaningful educational benefit Of the factors enumerated by the *cypress-Fairbanks* court, only two merit extended discussion in this case. [fn7]

1. Coordinated Extension of Services

> Although HISD experienced difficulties implementing Caius' IEP, this Court finds that all services outlined in the IEP were provided to Caius without undue delay. The most signific.ant failing alleged cm the part of HISD involves the speech therapy components of Caius' IEP. For substantial portions of the 1994- 1995 school year, a speech therapist was not available at Mitchell Elementary to provide needed speech serv ices to Caius. However, HISD did not refuse to providc these scrviccs. Often, educational agencies may not be able to locale itinerate staff or independent contractors capable of providing services when needed. Under these circumstanccs, a court should not question

an agency's efforts to comply with the IDEA -- particularly when compensatory services are offered. See 34 C.F.R. part 300, app. C, question 51 (1997) ("[A]s long as there is no change in the overall amount, some adjustments in scheduling [IEP] services should be possible (based on the professional judgment of the service provider) without holding another IEP meeting.").8 This analysis applies with equal force to HISD's inability to provide an Alphabetic Phonics program for two months during the beginning of the 1996-97 school year.

The hearing officer erred as a matter of law by questioning the manner in which the Alphabetic Phonics and IEP modifications were implemented by HISD A local education agency must provide the services and modifications outlined in an 1EP. However, educators must he allowed to makc decisions in the classroom with respect to the exact manner of their implementation. [fn9] The undisputed evidence shows that HISD initiated the modifications called for in Caius' IEP. Courts should not question a "front line" educator's day-to-day instructional techniques or the extent of a modification's implementation so long as the modifications are provided. HISD provided the modifications and services outlined in Caius' IEP, allowed Caius' parents to air grievances, and regularly conducted AR[) Committee meetings to evaluate Caius' progress under the IEP. As such, this Court finds that HISD provided educational services to Caius in a coordinated and collaborative manner.'°

2. Demonstrable Academic Benefit

With respect to Caius' education, the parties contest the appropriate manner for measuring academic advancement under the IDEA. The defendant claims that a child's percentile scores are the best measure of academic perfonnance. Citing *Rowley,* HISD argues Lliut passing marks and advancement from grade to grade arc sufficient indicia of advancement to satisfy the IDEA. While Caius generally experienced grade level increases in all subjects under his IEP, the defendant's expert tcstificd that Caius' percentile scores declined. Furthermore, the expert argued that Caius had not received an educational benefit bccausc he had failed to register a twenty month gain in a twenty month perlod under the program -- the level of progress she expected he would achieve.

Under the IDEA, a student's progress must be measured with respect to the individual student -- not his peers. Although passing horn grade to grade and the receipt of passing marks are important factors to consider, a court should examine a child's entire academic record when determining the existence of an educational benefit." This inquiry should include a consideration of the testimony of a child's instructors and other education experts. *See Cypress-Fairbanks,* 118 F.3 d at 255 (relying on testimony of "individuals who had direct and frequent contact with [the child] both in and outside the school setting").

Percentile scores, however, arc not appropriately considered undcr the IDEA. Tinder the act, an agency is not required to provide a student with the best possible education nor maximize a student's educational potential. *Rowley, 458* U.S. at 197-98 n.21, 198, 200. A school district must design an IEP, with respect to the unique needs of a disabled child, such that the *individual student* receives an educational benefit from the program. *El Paso*

indep. Sch. LEst. v. Robert W., 898 F. Supp. 442, 449 (W.D. Tex. 1995). Declining percentile scores do not represent, necessarily, a lack of educational benefit with respect to the individual student. instead, the scores measure a child's inability to maintain the same level of academic progress achieved by his nondisabled peers.

As prcviously discussed? the IDEA was not designed to guarantee the academic success of a disabled child. In passing the iDEA, Congress sought to ensure that disabled children would not be denied access to the educational services available to their non-disabkd peers. the act does not require maximization of a child's potential.

In *fact,* the act implicitly recognizes the potential inability of an educational system to provide the resources necessary for a child to obtain this level of success. As such, an examination of a child's expected level of advancement over a given period, akin to maximization of his educational potential, and comparison of the child's progress through percentile scores, as opposed to individual gains, are improper measures of ac.ademic progress.

Based on a review of the entire. educational record, this Court concludes that Caius received a demonstrable educational benefit under his IEP's Caius' grade equivalent scores increased in the vast majority of the areas tested.'2 Caius' teachers testified that Calus was making progress academically. During all relevant periods of enrollment under his IEP's, Caius had received passing marks in his classes and had been placed fn.[13] in consecutively higher grades. In fact, Caius was acknowledged recently as one be expected to make one month's gain in reading and language skills in the same amount of time so long as the program is consistently and appropriately implemented.

FOOTNOTES

[fn1]In the summer following the 1994-95 school year, Caius received 25 hours in compensatory speech therapy. These services were designed to compensate Caius for the speech therapy he had not received during the regular school year.

2 An IEP must contain the following:

> (A) a statement of the present levels of educational performance of [the disabled] child, (B) a statement of the annual goals, including short-term instructional objectives, (C) a statement of the specific educational services to be provided to such child, and the extent **Lu which** such child will be able to participate in regular educational programs, (U) a statement of the needed transition services. . . (E) the projected date for initiation and anticipated duration of such services, and (F) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether instructional objectives arc being achieved,

20 U.S.C. § 1401(20).

[fn 3] At the time the Supreme Court heard *Rowley*, the iDEA was known as the **Education of** the Handicapped Act ("EHA"). *Rowley, 458* U.s. at 179. The formal name of the EHA was changed to the IDEA in 1990. 20 U.S.C. § 1400(a).

[fn 4] A House Committee discussion on the content of IEP's contains the following proviso:

> [W]hilc teaching and related services methodologies or approaches arc an appropriate topic for discussion.. . by the IEP team. . - they are not expected to be written into the TEP. Furthermore, the Committee does not intend that changing particular methods or approaches necessitates an additional meeting of the IEP team.

H.R. Rep. No. 105-95, at 101 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 99. The Committee also noted,

> Specific day to day adjustments in **instructional** methods and approaches that are make by either a regular or special education teacher to assist a disabled child to achieve his or her annual goals would not normally require action by the child's IEP team.

H.R. Rep. No. *105-95,* at 100 (1997), *reprinted in* **1997 U.S.C.C.A.N.** 78, 98.

[fn 5] Prior to the administrative hearing in this matter, the defendant withdrew all procedural objections related to Caius' **IEP. As** such, this Court will not consider arguments related to the first half of the *Rowley* test. *Gardner v. School Bd.,* 958 F.2d **108, 112 (5th** Cir. 1992).

[fn 6]Rowley, 458 U.S. at 203-04, 207 n.28.

[fn 7] The defendant does not dispute, nor could he, the individualized nature of Caius' 1EP

and the placement of Caius within the least restrictive educational environment.

[fn8]Although the Court has found that HISD provided all the services listed in Caius' IEP, a brief comment on HISD's record keeping is apropos. When students are deprived of services for brief periods of undue delay, an agency must keep extensive records of the lost services and compensate a student accordingly. HISD s record keeping efforts were exceedingly poor in this respect. However, based on the hearing officer's determination that only 1 R weeks of speech therapy wcrc not provided and evidence that Caius received approximately *25* hours of speech therapy in the summer of 1995, Calus was appropriately compensated for any delay on the part of HISD,

[fn 9] See *supra* note 4.

[fn10]At least one court has held that a local education agency's failure to providc all the services and modifications outlined in an IEP does not constitute a per se violation of the IDEA. *In Gillette v. Fairlcrnd Bd. of Educ.*, the court found that an agency had provided a frcc appropriate public education when *"sign ificant provisions* of the TEP were followed" even though the petitioner had clearly demonstrated that portions of the IEP were not implemented at all. *725 F.* Supp. 343, 347-48 (S.D. Ohio 1989) (emphasis added), *rev'd on other grounds*, 932 F.2d 551 (6th Cir. 1991).

[fn 11] *Rowley*, 458 U.S. at 203-04, 207 n.28

[fn 12] *Over* the period covering 1993 to 1995, Caius' test scores changed in the following manner: Math, 1.7 (grade level) to 3.1; Written Language, 1.5 to 1 .9; Passage Comprehension, 1 .7 to 2.2; Calculation, 1.4 to 3.; Applied Problems, 2.0 In 3M; Dictation, 1.6 to 1 .8; Writing, 1.4 to 2.6; Word identification, 1.8 to 2.1; and Word Attack, seven-month kindergarten to 1.8. Prom 1995 to 1996, Caius' grade levels improved as well: Math, 3.1 104.4; Written Language, 1.9 to 2.9; Passage Comprehension 2.2 to 3.9; Calculation, 3.3 to 5.0; Applied Problems, 3.0 to 3.6; Dictation, 1.8 to 2.8; Writing, 2.6 to 3.3; Word Identification, 2.1 to 2.8; Word Attack, unchanged Broad Reading, 2.1 to 3.3; Basis Reading Cluster, 2.1 102.8; Proofing, 2.3 to *2.6.*

[fn 13]HISD distinguishes between placement in and promotion to higher grades. A promotion entails achievement of the mainstream educational requirements of a atudent's grade level and advancement to the next level. When a child is placed, his academic performance, while not equivalent Lu the successive grade level, is deemed sufficient under the circumstances to merit advancement.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION
HOUSTON INDEPENDENT SCHOOL DISTRICT, Plaintiff, VERSUS BOBBY R.; JOYCE R.; and CAIUS R., Defendants.

3/24/98

FNAL JUDGMENT

Pursuant to the memorandum opinion entered in this matter, the plaintiff's motion for summary judgment (Instrument #14) is GRANTED. The decision of the Texas Education Agency hearing officer is overturned, and all relief granted thereunder is withdrawn.

The defendant's motion for leave to file first amended answer and counterclaim (Instj'ument #22) is GRANTED. All federal causes of action set forth in the defendant's count4rclaim are DISMISSED. The Court ABSTAINS on all state law issues. The defendant's amended motion for summary judgment (Instrument #18) is hereby DENIED.

The Court finds that neither party is entitled to an award of costs or attorney's fees in this matter.

This is a final judgment.

Signed this 23th day of March,
United States District Judge

BOBBY R.; JOYCE R.; and CAIUS R., VERSUS HOUSTON INDEPENDENT SCHOOL DISTRICT
Docket No. 89-SE-1096
BEFORE A SPECIAL EDUCATION HEARING OFFICER
STATE OF TEXAS

4/2/97

DECISION OP THE HEARING OFFICER

Stateient of the Case

Petitioner Caius R. ("Caius") filed his request for hearing against Respondent Houston Independent School District ("HISD" or the "school district" or "district") under the Individuals with Disabilities Education Act ("IDEA") on October 22, 1996. Numerous continuances were granted for the purpose of resolving scheduling conflicts, providing the parties opportunities to attempt resolution through mediation and, to complete discovery. Both parties waived the 45 day rule.

Petitioner was represented by his counsel, Daniel McCall, Attorney at Law. Respondent was represented by its counsel, Hans Graff, Assistant General Counsel for the school district. The due process hearing in this case was conducted on February 18 and 19, 1997. The parties submitted written closing arguments on February 27, 1997. By virtue of the tolling effect of the 45 day waiver, the decision in this case is due April 5, 1997.

Issues

The parties identified the following issues for decision:

1. Whether the school district has provided Caius with a free, appropriate public education for the period of time beginning in January, 1994 through the present school year; specifically,

   a. whether the goals and objectives stated in the Individual Educational Plan ("IEP") for each school year **within the designated time period** were appropriate;

   b. whether the goals and objectives of each IEP were realistic given his baseline skill levels or whether the goals and objectives should have addressed specific deficits in auditory processing, visual perception, auditory memory afld oral language processing;

   c. whether instructional modifications stated in the Individual Educational Plan ("IEP") for each year were properly and consistently implemented;

   d. whether the school district should have provided Caius with a specific, published multisensory instructional program in language arts and whether the district agreed to provide Caius with such instruction through the "Alphabetic Phonics" system and failed to do so;

2. Whether the school district agreed to provide Caius with speech therapy for the 1994-95 school year and failed to do so;

3. Whether the placement at Mitchell Elementary for the period of time beginning in January, 1994 through May, 1996 and at Codwell Elementary for the current school year w+re appropriate; specifically, whether alternative place$nts within the district should have been made if the pr4grams and services he needed could not be provided at the Mitchell and Codwell campuses; and,

4. Whether the school district had notice of Petitioner's complaints about the program and placement now in dispute.

A procedural complaint was withdrawn by the Petitioner prior to the commencement of the hearing.

Relief Requested

As reflef, Petitioner requests the following:

1. The A4mission, Review & Dismissal ("ARID") Committee convene for the purpose of revising and redesigning an IEP for Caius for the remainder of the current school year;

2. placement at a campus that can provide the multisensory instruption, program, and services he needs if that instruction, program and/or services cannot be provided at Codwell Elementary;

3. Training for school district personnel who will teach Caius j.n the specific multisensory instructional program chosen by the ARD Committee to meet his needs (such as training for the Alphabetic Phonics system);

4. Compensatory relief in the form of one—to-one after school tutoring to be provided by the school district or a third party provider beginning this school year through the summer of 1997.

Findings of Fact

1. Caius is an energetic, outgoing, curious 11 year old of average intelligence with the motivation to succeed. He is in the sixth grad4 at Codwell Elementary this year. He previously attended Mitchell Elementary during the relevant time period.

2. Caius is eligible for special education services as a student with a learning disability. Specifically, Caius has been diagnosed with dyslexia. Dyslexia is a lifelong process of learning language. Caius has both oral language processing and auditory memory deficits as well. He has difficulty remembering the order of sounds in a word. He exhibits problems with dysnomia (word retrieval). His language impairment is moderate to severe. Caius also has some attentional deficits and difficulties with organization. He has trouble keeping up with his homework. Writing tasks are difficult due to a moderate delay in visual-motor integ4ation skills.

3. Caius is a strong global visual—kinesthetic learner with significantly weak auditory skills, particularly auditory recall, auditory sequencing and concentration to auditory

tasks. Caius responds well to support and encouragement and needs "hands on" learning experiences.

4. There is no dispute that Caius needs a multisensory, systematic, Orton—Gillingham based curriculum to address his needs in reading, writing, and spelling. The multisensory approach to teaching reading and language skills is a balanced approach using all modalities. It is a proven methodology used in regular as well as special education classrooms in the district. There are a variety of programs that use a xnultisensory approach.

5. At the request of Caius' parents, the school district provided Caius with individual reading instruction through a multisensory curriculum *nown as "Alphabetic Phonics." Alphabetic Phonics is comprised of a series of levels organized into kits. Students work through the various levels one kit at time. A student with average intelligence working through the Alphabetic Phonics curriculum can were not consistently or appropriately implemented. For example, neither Caius' science nor social studies textbooks contained any significant or meaningful highlighting. The evidence also showed that the district sent a collection of over 80 cassette tapes to Caius' parents which required them to examine each one. None of the tapes provided by the district corresponded to any of Caius' textbooks.

6. Alphabetic Phonics requires instruction from a teacher specifically trained in the use of that program. A number of HISD teachers have received Alphabetic Phonics training through a private teacher training center in Houston known as the Neuhaus Center. Not all HISD schools have teachers on campus trained in Alphabetic Phonics. Alphabetic Phonics is simply one of a variety of multisensory programs.

7. Caius received Alphabetic Phonics instruction from three different teachers over a period of twenty months. At one point he changed instructors in the middle of the year. The teachers had varying skifl and training in the use of Alphabetic Phonics. Caius has made a twelve month gain in a twenty month period. He has not progressed past the fourth kit. He also has repeated portions of beginning kits.

8. Caius Continues to demonstrate significant difficulties with literacy. He has made only trivial progress, at best, in word attack and phonological awareness skills over the relevant time period. This result was due, in part, to the inconsistent implementation of the Alphabetic Phonics program as well as the unique nature of Caius' learning disability. His instructional reading level has been at a second to third grade level for the past two years.

9. The reading and language goals stated in his IEP are reasonable and calculated to provide Caius with an educational benefit. They reflect his needs in those areas as identified by a wide variety of assessments.

10. Caius' reading and language deficits affect his ability to master material in other academic subjects such as science and social studLes and, in math, with word problems. Caius has been mainstreamecj for those subjects and, to address his needs, the ARD Committee has specified a required set of instructional modifications to be implemented in those classes.

11. ModifiQations stated in the sixth grade IEP include: modified texts; extended time for assignment completion; shortened assignments; use of calculator in math class; and, in science and social studies classes: taped texts and

highlighted texts. In addition, the IEP stated that Caius was to receive taped assignments to address his difficulties with handwriting and organization.

12. The credible evidence showed that some of these modifications

13. There was some evidence that teachers recorded spelling words for Caius at school but he did not take the tapes home. Since Caius' reading skills are not commensurate with the reading level of his sixth grade textbooks these modifications were critical to providing Caius an educational benefit from his mainstream classes.

14. Caius also needs individual speech and language therapy to address his language disability. There is a severe shortage of speech therapists in HISD. There was no qualified speech therapist to provide Caius with speech and language therapy during the spring of 1995. Speech therapy was a related service designated by the ARD Committee on his IEP. He did not receive any speech therapy for a period of time beginning in January, 1995 through the end of the school year in May.

15. Instead, the district provided Caius with a speech and language program in the summer of 1995 as compensation for the services he was denied during the school year. Caius receives individual speech and language therapy this year in sixth grade.

16. Caius' parents have struggled with the HISD bureaucracy over the years in an attempt to secure appropriate services for him. His parents have been confused about the nature and availability of the school district's programs and feel the district could never clearly expLain or

identify the services and programs it uses to serve students with dyslexia.

Discussion

FAPE Issues:

Petitioner complains that the goals and objectives of his IEP's from January 1994 to the present were not appropriate nor realistic and that there should have been specific goals and objectives to address his auditory, visual and oral language deficits.

The determination of whether a school district has provided a student with **a free,** appropriate public education under the IDEA is twofold. First, has the district complied with the procedural requirements of the Act? Second, is the program at issue reasonably calculated to enable the student to receive an educationalbenefit?
Hendrick Hudson Dist. Bd. of Educ. v. Rowley, 458 U.S. 17$, 206—207 (1982).

In this case, issues related to any procedural complaints were withdrawn prior to the beginning of the hearing. Indeed, the evidence showed that Caius' parents were active participants in each and every ARD meeting and that their recommendations and requests in both programming and placement decisions were often accepted by the ARD Committee. The IEP's at issue were the result of collaborative efforts between parents and school and I find, therefore, that the district did comply with the procedural requirements of the IDEA.

In addressing the second prong of the IDEA test it is well settled that an appropriate education is one which

provides personalized instruction and sufficient support services to permit the student to receive an educational benefit from that instruction, Rowley, 458 U.S. at 187-205; ; Cypress-Fairbanks Ind. Sch. Dist. y. Michael F., 23 IDELR 1041 (S.D. Tex. 1995).

However, the educational benefit must be meaningful. The IEP must provide more than a de minimus benefit and it must be likely to produce progress not regression or merely trivial advancement. Polk v. Susquehana Int. Unit 16, 853 F. 2d 171, 181 (3d Cir. 1988); Oberti v. B4. of Educ., 995 F. 2d 1204 (3d Cir. 1993); Bd. of Educ. V. Diamond,808 F. 2d 987, 991 (3d Cir. 1986).

The credible evidence in this case showed that the IEP goals and objectIves themselves were appropriate. There was no controverting evidence to show otherwise. Petitioner did not meet his burden of proving that the IEP's in dispute were, in themselves, inappropriate. Tatro v. State of Texas, 703 F. 2d 823 (5th Cir. 1984) (aff'd in part and rev'd in part sub nom. Irving Ind. Sch. Dist. v. Tatro, 468 U.S. 883 (1984).

Implementation Issues:

Petitioner also complained that the school district did not properly implement instructional modifications stated in the IEP's or the Alphabetic Phonics reading curriculum. In this regard, the credible evjdence showed that the modifications stated in the IEP were not properly and consistently implemented. In this sense, Caius was denied the personalized instruction and sufficient support services he required to receive an educational benefit. See, Rowley, supra.

Instructional Modifications

The school district is legally obligated to ensure that the individualized program developed by the ARD Committee is fully and properly implemented. This requires that the district ensure that each of Caus' teachers is aware of his IEP and the instructional modifications they are required to follow in their classrooms. The school district has the overall responsibility to ensure that the resources necessary for implementing the instructional modifications are provided to Caius' teachers and to Caius. See, Reed J. v. Houston Ind. Sch. Dist., Docket No. 019-SE-996 (SEA Tex. 1996) (appeal pending). In this case, the evidence showed that the teachers did not provide highlighted or taped texts and assignments in a consistent manner.

The teachers thought it was up to their discretion as to when and how to tape and/or highlight assignments and textbooks. Caius' parents understood it to be an on-going, daily aspect of Caius' program. The ARD Committee needs to clarify this issue. Since Caius' instructional reading level is second or third grade and he is using sixth grade level textbooks it is logical to conclude that he requires regular, on—going modifications in order to comprehend the material.

The ARD Committee must therefore provide Caius' teachers with sufficient support so they can implement the required modifications in a way that is easy and functional for them to do. Teachers may need extra time each day or extra help to complete highlighting, taping, or the preparation of study guides. The district must find ways to facilitate this and support Caius' teachers in completing these tasks.

The Reading Program

In addition, the evidence also showed that while he made some progress in his reading and language, it was at a slow, albeit steady, rate. In sum it was not the rate one would typically expect of a youngster with average intelligence such as Caius. His ability to decode and decipher words and to retain auditory information has remained essentially "flat" for the past two to three years. The evidence showed that any progress he made was more trivial than meaningful. Polk , supra; Oberti, supra.

It is reasonable to infer that the inconsistent instruction he received in the Alphabetic Phonics program from three different teachers of varying skill level was a factor in this outcome. There was also some evidence to suggest that Caius will always have difficulties in mastering decoding skills and that he may be better served by learning whole words rather than attempting to break them down. The ARD Committee, in planning for seventh grade, should consider revising Caius' IEP to include goals and objectives directed towards the acquisition of a functional sight word vocabulary.

The evidence also showed that Caius' parents insisted on the use of the Alphabetic Phonics program to address his reading and language needs. However well motivated this position may have been his parents had no legal right under IDEA to compel HISD to provide Caius with a specific program or employ a specific methodology. Lachman V. illinois State Bd. of Educ., 852 F. 2d 290, 297 (7th Cir. 1988); See, Wall v. Mattituck-Cutchogue Sch. Dist., 24 IDELR 1162 (E.D. N.Y. 1996).

However, the evidence showed that the district did agree to use the Alphabetic Phonics program. Therefore, once the ARID Committee decided to use Alphabetic Phonics to

implement a portion of Caius' reading IEP, it was the district's legal obligation to ensure that it was properly and systematically done.

Conclusion

Once the ARD Committee commits to a specified program, support service, or set of instructional modifications, the school district is legally responsible for implementing those features of the IEP and in securing the necessary resources to do so. See, Reed J. V. Houston ISDI supra. The evidence showed a lack of leadership in following through on both the implementation of specified instructional modifications and systematic instruction under the Alphabetic Phonics curriculum as aspects of Caius' IEP.

Speech and Language Therapy:

The school district failed to implement the speech and language IEP for a period of time from January 18, 1995 through May, 17, 1995. This constitutes a denial of a free, appropriate public education. The school district's efforts to provide a summer program as a compensatory service for this failure was commendable. However, it does not cure the harm that resulted from the loss of that period of time in which Caius needed to work on further acquisition and mastery of speech, language, and, auditory skills. Again, the problem was one of implementation of an appropriate IEP as opposed to a deficit in the IEP itself.

Placement:

Placements at Mitchell Elementary from January, 1994 through May, 1996 ard at Codwell Elementary for the current school year were appropriate. Petitioner simply did

not meet his burden of proving alternative placements within the district would have been the least restrictive environment for Caius. The placements made at the two campuses were in response to parental requests.

Notice of Parental Complaints:

The school district had notice of Petitioner's complaints about the programs and placements in dispute. Caius' parents made repeated inquiries and posed concerns about his program and the implementation of instructional modifications in a number of ARD meetings and through on-going communications with various district personnel.

Conclusions of Law

1. Caius is student with a learning disability entitled to special education services from the Houston ISD. 20 U.S.C. Sec.
1400—1401.

2. Petitioner did not meet his burden of proving that the goals and objectives stated in the IEP for the academic years 1994/95 through the present (1996/97) were not reasonably calculated to provide Caius with a meaningful educational benefit. Rowley, supra.; Tatro, supra.

3. The instructional modifications stated in the IEP for each year were not properly or consistently implemented. Failure to implement an appropriate IEP constitutes denial of free, appropriate public education under the IDEA. Rowley, supra; Reed J. v. Houston ISD, supra.

4. Caius' parents do not have a legal right under the IDEA to insist the school district adopt or provide a specific

methodology or program, including the use of Alphabetic Phonics. Instead, those choices are left to educators so long as the methodologies and programs employed meet Caius' unique needs. Lachman, supra.

5. However, once the school district eed to provide Caius with individualized reading instructio hrough the use of the Alphabetic Phonics curriculum it ligated to ensure the instruction was properly imp result is a denial of a free, approp: ion. Rowley, supra.

6. The school district fa .us with speech and language therapy from Janu y 1995 as specified in his IEP. This was a f nt a portion of Caius' IEP and as such constitute a free, appropriate public education under IDEA. the provision of an extended year services program the following summer may have been necessary to prevent regression but does ot "cure" the loss of speech and language services that wasA o have been provided the previo6s semester. See, 19 Tex. Admin. de Sec. 89.235 (f).

7. Petitioner did not meet his burden of proof that the placements at Mitchell and Codwell Elementary Schools were not appropriate or the in the least restrictive environment. Tatro, supra.

8. The school district had "notice" of parental complaints regarding Cajus' placement, program, and the

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implementation of his IEP over the relevant time period. See, Garland Ind. Sch. Dist.
v. Wilks, 657 F. Supp. 1163, 1168 (N.D. Tex. 1987).

ORDERS

Based upon the foregoing findings of fact and conclusions of
law it is hereby ORDERED that Petitioner's requests for relief are
GRANTED IN PART and DENIED IN PART. It is hereby ORDERED that the
ARD Committee convene within five school days of the date of this
Decision for the purposes of:

1. Confirming the continued use of the Alphabetic Phonics curriculum with the current certified instructor through the end of this academic year;

2. Identifying an HISD staff member, teacher, and/or administrator to function as an Inclusion Facilitator by setting up a regular schedule of observation and consultation with all of Caius' teachers to ensure they receive the necessary support to properly implement the set of required instructional modifications stated in Caius' current IEP. A copy of the schedule shall be provided to Caius' parents.

3. Designate an HISD staff member, teacher, and/or administrator to function as a liaison between Caius' parents and the school district

in order to improve communication between the parties. The duties of the liaison will be to secure and provide Caius' parents with accurate and reliable information regarding the district's speech and reading programs as well as placement information to begin planning for Caius' entry onto a middle school campus next year.

4. Design and identify appropriate compensatory services to be provided during the summer 1997 to address Caius' needs in reading, language, and, speech. All other relief not specifically granted herein is DENIED.

SIGNED the 2nd day of April, 1997.

Ann Vevier Lockwood
Special
Education
Hearing officer

NOTICE TO THE PARTIES

Under current State Board of Education rules it is no longer necessary for a party to perfect an appeal to state district court by filing a Motion for Re-Hearing. However, either party may request, within ten (10) days after the date of this decision, specified additional or amended findings of fact and/or conclusions of law. 19 Tex. Adrain. Code Sec. 157.8 (n) (o).

SYNOPSIS

Caius R. bnf Mr. and Mrs. Bobby R. v. Houston ISD;

Issue:

Whether goals and objectives stated in IEP's for past two years provided educational benefit to sixth grader with dyslexia, oral language processing, auditory memory and sequencing, visual-motor integration and, attentional deficits.

Held:

For the school district. Petitioner did not meet his burden of proof in challenging the programs in dispute.

Issue:

Whether the school district agreed to provide Alphabetic Phonics curriculum as part of student's reading and language programs and whether it failed to do so.

Held:

For the student. Parents have no legal right to compel school district to employ a specific program or methodology. However, because evidence showed school agreed to implement part of student's reading and language IEP's through use of Alphabetic Phonics failure to do in a consistent and proper manner constituted a denial of a free, appropriate public education under IDEA. Student entitled to compensatory relief in the form of summer services in 1997.

Issue:

Whether the school district failed to properly implement instructional modifications stated in student's IEP's.

Held:

For the student. Credible evidence showed school district failed to provide highlighted and taped textbooks and assignments stated in IEP on a regular on-going basis. Failure to properly implement IEP constitutes denial of a free, appropriate public education under IDEA. ARD Committee to designate Inclusion Facilitator to observe and consult with teachers on a regular basis to support them in providing the necessary modifications.

SYNOPSIS Continued

Caius R. bnf Mr. and Mrs. Bobby R. v. Houston ISD

Issue:

Whether the school district failed to provide student with speech therapy during the 1994-95 school year.

Held:

For the student. Evidence showed ARD Committee decided student needed speech therapy as a related service but due to critical shortage of certified speech therapists within the district, school failed to provide student with those services for the spring semester that year. Provision of an extended year program the following summer may have been necessary to prevent regression but did not cure failure to